No. 5634

United States

Circuit Court of Appeals

For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5634

United States

Circuit Court of Appeals

For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

Messrs. BRONSON, JONES & BRONSON, Attorneys for Appellee,
614 Colman Building, Seattle, Washington.

Messrs. COSGROVE & TERHUNE, Attorneys for Appellant,
2001 L. C. Smith Bldg., Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 11,940.

LAKE UNION DRYDOCK & MACHINE WORKS, a Corporation,
Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,
Defendant.

STIPULATION RE COURT'S OPINION.

IT IS HEREBY STIPULATED that the attached transcript of the opinion of the Court, rendered at the close of the evidence and argument herein, may be filed as of the date of the rendition thereof, to wit: September 6, 1928, and may be transmitted to the Circuit Court of Appeals as a part of the record on appeal herein.

---

*Page-number appearing at the foot of page of original certified Supplemental Transcript of Record.

Dated at Seattle, Washington, this 7th day of December, 1928.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

COSGROVE & TERHUNE,
Attorneys for Defendant. [2]

COURT'S OPINION.

The COURT.—I have been considering this as the testimony has been going on and during the lunch hour I dictated one or two items to my stenographer. There is little dispute in the facts. From undisputed statements in court it may be concluded that the ship in issue was at the dock of the plaintiff undergoing repairs; engines sold by the defendant were being installed, some work was done upon the vessel at the request of the defendant by the plaintiff and other repairs at the request of the owners of the ship. The work done at the instance of the defendant was paid for. The defendant took a mortgage upon the ship for thirty thousand dollars or more, the statement in court fifty thousand, but there is no evidence as to that amount. The plaintiff's claim in issue was unpaid. The credit man of the defendant at Seattle was treasurer for the owners of the ship. The plaintiff was led to believe from the statements of the credit man of the defendant, the treasurer for the owners, that the defendant would take care of the claim of the plaintiff. This assurance on the part of the credit man of course was unauthorized by the de-

fendant. It was understood by all of the parties prior to and at the time of the execution of the trade acceptance in issue that the claim of the plaintiff was prior to the mortgage of the defendant. While the vessel was at Port Houston, the plaintiff requiring funds to meet an obligation, advised the credit man of the defendant of this need and the fact was developed that the plaintiff demanded that its claim be adjusted or the vessel would be libeled before it left Port Houston. The matter had not been presented concretely to Mr. Miller at least, the manager of the defendant at Seattle, prior to this time by the plaintiff. Miller, the manager, stated that he had no [3] authority to make an adjustment, that he would have to take the matter up with the officers of the company, and thereupon communicated with Thomas at Los Angeles and was authorized by Thomas to make the best adjustment that could be obtained, exercising his best judgment as to what to do, and thereupon or thereafter the trade acceptance was executed in harmony with the suggestion of the bank where this collateral or acceptance was to be negotiated and an assignment of the claim delivered to the defendant or Mr. Miller, its manager. Thereafter Mr. Kuppler, the credit manager, made his report to the main office in Chicago. Upon receipt of this report the defendant soon thereafter dispatched a representative or two to Seattle for the purpose, as said by Mr. Boughey while on the stand, to see about paying up the whole matter. Upon arriving at Seattle, however, or thereafter, on July 7th fol-

lowing, steps were taken to disavow the transaction. The vessel after sailing from Port Houston and arriving at the Port of Honolulu was attached by the defendant upon proceedings of foreclosure of mortgage and thereafter upon decree duly entered was sold and bid in by the defendant for the amount of its claim, I think it was stated in court fifty thousand dollars. At Seattle on July 7th through its attorneys the defendant wrote a letter to the plaintiff and to the bank taking this acceptance that it disavowed the transaction and denied the authority of Miller, its manager at Seattle, to execute the trade acceptance, and offered to deliver the acceptance to whoever was entitled to it. No tender, however, was made to anyone, but the assignment was held by the defendant until it was produced as an exhibit in evidence upon this trial.

I think the proofs establish the further fact that Thomas [4] had authority to execute or to direct the execution of the trade acceptance. There is testimony in the record that such is the fact and this is not denied by any of the evidence produced. I am convinced from all of the circumstances disclosed and the testimony presented that Mr. Miller is in error when he states that he told Mr. Jones that he had no authority to sign the acceptance at the time that it was delivered to him and also told him that he did not want the assignment and that Jones threw the assignment on the table and left it. And it must follow that Miss Anderson is in error

in her testimony when she said she heard Mr. Miller make the statement that he had no authority to sign the acceptance and that it was of no value. This testimony is absolutely contrary to the other evidence in the record, the conduct of Mr. Miller prior to that time in communicating with Mr. Thomas and the telegrams that had been received and what was done by the parties at the time; it is contrary to every reasonable conclusion to follow from the admitted undisputed facts appearing before the court. The statement as to lack of authority was made when Mr. Miller stated that he was powerless and would have to refer the matter to the officers of the company and then was given two days within which to do so and upon the conclusion of the communication and the advice of his attorneys he executed the trade acceptance. The statement of Mr. Miller that he told Mr. Jones he did not want the assignment and that Mr. Jones threw it on the table is not sustained by the evidence, not sustained by the record in the case, nor by the testimony of Miss Anderson, offered in corroboration, who said she heard the conversation and that all that was said was that he had no authority to sign the acceptance and that it was of no value as made. [5]

The evidence strongly preponderates and upon the evidence I feel convinced beyond a reasonable doubt that the execution of the trade acceptance by Miller was authorized by Thomas, who was empowered to give the authorization, and I think I might further state that the fact that the defend-

ant held a mortgage upon this vessel, knew of the plaintiff's claim and defendant's conduct after the receipt of Mr. Kuppler's letter, the delay in the disavowance or attempted disavowance of this contract until the entire change of relation between the parties, so strongly preponderates in favor of the plaintiff that the Court it would seem to me would be acting unconscionable to say that after the lapse of that time that the defendant should be permitted to disavow unless the status of the parties was restored. The manager at Seattle within the scope of the authority disclosed in the evidence in this case undoubtedly has power to incur incidental expenses in the collection of claims on sales made through the office for the defendant. This acceptance is an incident to the collection of a large claim. To have libeled the vessel and to have tied it up for only a day would have incurred an expense to the defendant equal perhaps, if not more than, the amount of the claim, and in addition would have been required to pay the claim of the plaintiff together with all of the incidental costs incurred in the collection, and while that is none of the Court's affair, it would seem that the local officer of the defendant ought to be complimented in exercising the judgment in forestalling the expense that would necessarily be incurred in permitting the vessel to be libeled under all of the circumstances if the claim of the plaintiff, as the testimony shows in this case, was considered by all parties to be prior to that of the defendant. I

think judgment for the plaintiff must be entered. There is nothing else that can be done.

[Endorsed]: Filed Dec. 11, 1928. [6]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming regularly on for trial on the 4th day of September, 1928, before the Court, a trial by jury having been waived in writing by the parties, the plaintiff appearing by its attorneys, Bronson, Jones & Bronson, and the defendant appearing by its attorneys, Cosgrove & Terhune, evidence having been submitted to the Court, the defendant having challenged the sufficiency of the evidence and having moved for dismissal, such challenge and motion having been denied and exceptions noted, the Court does now make the following findings of fact:

I.

That plaintiff is a corporation organized and existing under the laws of the State of Washington.

II.

That defendant is a corporation organized and existing under the laws of the State of Illinois, and during all the times hereinafter mentioned had its home office at the City of Chicago, Illinois.

III.

That the defendant, during all the times herein-

after mentioned, and since 1858, has been engaged in the manufacture and sale of engines, pumps, scales and similar equipment and machinery; that for many years prior to June 2, 1927, it has carried on its business in the State of Washington through its local manager, resident at Seattle. [7]

IV.

That on June 2d, 1927, the defendant acting through C. R. Miller, its local manager at Seattle, as agent, executed and delivered to the plaintiff its certain trade acceptance for the sum of Eight Thousand Dollars ($8,000.00) and Two Hundred Sixty-six and 66/100 ($266.66) interest, payable September 20, 1927, which is in evidence as Plaintiff's Exhibit 5 herein; that in consideration of the execution and delivery of said trade acceptance, the plaintiff assigned and delivered to the defendant its claim against a certain vessel, to wit: the M. S. "Ethel M. Sterling," which assignment is in evidence herein as Plaintiff's Exhibit 7, and released and relinquished certain insurance previously placed by the defendant upon the said vessel for the protection of the plaintiff, as set forth in Plaintiff's Exhibit 3 herein, and also forebore and refrained from the exercise of its right of libeling said vessel, then in the port of Galveston, Texas, and about to sail therefrom on June 4, 1927, to secure the payment of its claim; that at all of such times the defendant had, or claimed to have a mortgage upon said vessel, the "Ethel M. Sterling," for the sum of Thirty Thousand Eight Hundred Dollars ($30,800.00), and that the claim of the plain-

tiff was conceded and expressly recognized by the defendant as being superior to and entitled to prior payment as against its said mortgage; that the defendant also held an assignment of the freights of said vessel, the "Ethel M. Sterling," and was vitally interested in having said vessel proceed upon her voyage on June 4, 1927, and in havng the plaintff refrain from asserting its claim against said vessel. [8]

V.

That the said C. R. Miller, in executing said trade acceptance, was acting solely in the interest of the defendant, and in the protection of the defendant's interest in said M. S. "Ethel M. Sterling," on account of said mortgage and other bills and advances, aggregating approximately Fifty Thousand Dollars ($50,000.00), all of which were incurred through the defendant's local branch at Seattle under the charge of said C. R. Miller; and the collection of the freight moneys; that the authority of said C. R. Miller as local manager extended to the general handling of the business of the defendant in the State of Washington, Oregon, Idaho and a portion of Montana and Alaska, without any limitations or restrictions whatsoever made known to the general public; that the said C. R. Miller customarily reported to and acted under the general direction of A. W. Thompson, the Pacific Coast manager of the defendant, residing at San Francisco, or Los Angeles, and having general authority over all matters of defendant's branches on the Pacific Coast, at least up to sums not exceeding

$10,000, and who was authorized to act for the defendant in this transaction; that said Miller was expressly authorized and directed by the said Thompson, as Pacific Coast manager of the defendant, to act according to his discretion in the matter of the purchase of said claim, which authority is evidenced by an exchange of telegrams, being Plaintiff's Exhibit 8 herein.

VI.

That the defendant retained and profited by the consideration received by it from the plaintiff for the execution and delivery of said trade acceptance, to wit, the assignment of said claim, the release of the said insurance and the forbearance of the plaintiff to exercise [9] its right of lien against the said vessel "Ethel M. Sterling," none of which considerations were ever returned by the defendant to the plaintiff, and that the defendant has never offered to place, and it would have been impossible for it to place the plaintiff *in statu quo.*

VII.

That the defendant was fully advised of the giving of said trade acceptance on or before the 15th day of June, 1927, but that it did not notify the plaintiff of any disavowal or attempted repudiation thereof, until on or about July 8, 1927, and that such delay was unreasonable and prejudicial to the interests of the plaintiff and amounted to a ratification of such transaction by the defendant.

VIII.

That said trade acceptance was not paid when

due, nor has any part of the same been paid, and that the plaintiff is now the owner and holder thereof and entitled to receive payment thereon.

Done in open court this 18 day of September, 1928.

JEREMIAH NETERER,
Judge.

And as Conclusions of Law:

Finds that the plaintiff is entitled to judgment against the defendant for the amount of $8,266.66, together with interest upon the said sum from the 20th day of September, 1927, at the rate of Six per cent per annum.

Dated this 18 day of September, 1928.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 8, 928. [10]

[Title of Court and Cause.]

ORDER RESPECTING TRANSMISSION OF EXHIBITS.

Upon stipulation and request of counsel for both parties hereto, the Clerk of this court is hereby directed to transmit to the Circuit Court of Appeals, as a part of the record on appeal herein, the originals of all exhibits offered upon the trial hereof.

Done in open court this 17th day of December, 1928.

EDWARD E. CUSHMAN,
Judge.

O. K.—BRONSON JONES & BRONSON,
Attorneys for Plaintiff.

COSGROVE & TERHUNE,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 17, 1928. [11]

[Title of Court and Cause.]

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare supplemental transcript on appeal consisting of the following:

(1) Findings of fact and conclusions of law.
(2) Court's opinion.
(3) The originals of all exhibits offered upon the trial of this action.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 11, 1928. [12]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 12, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by supplemental praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the supplemental record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellee for making supplemental record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [13]

Clerk's Fees (Act Feb. 11, 1925), for making record, certificate or return, 28 folios at 15¢ $4.20
Certificate of Clerk to Transcript of Record, with seal ..... .50
Certificate of Clerk to Original Exhibits, with seal ..... .50

Total $5.20

I hereby certify that the above cost for preparing and certifying supplemental record, amounting to $5.20, has been paid to me by the attorneys for appellee.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 19th day of December, 1928.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [14]

[Endorsed]: No. 5634. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Co., a Corporation, Appellant, vs. Lake Union Dry Dock & Machine Works, a Corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the United States Dis-

trict Court for the Western District of Washington, Northern Division.

Filed December 22, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.